Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

SAFE AIR FOR EVERYONE,

Petitioner,

v.

WAYNE MEYER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, establishes a federal program for the regulation of solid and hazardous wastes designed to protect human health and the environment. Petitioner alleged in its complaint that open field burning by neighboring farmers of massive amounts of post-harvest crop residue was presenting an imminent and substantial endangerment to human health that was actionable under RCRA because the crop residue constituted a "solid waste," which RCRA statutorily defines as "discarded material," including material from "agricultural operations." 42 U.S.C. § 6903(27). The court of appeals held that the complaint should be dismissed on the ground that the crop residue was not "discarded material" even if 99.9 percent of the reason for the burning was to get rid of it because the material would otherwise harm crop productivity.

The question presented is whether secondary material generated by an industrial, manufacturing, agricultural, or commercial activity is not "discarded" and therefore not "solid waste" subject to RCRA, whenever the generator can establish that destroying the material results in some incidental economic benefit in addition to the overriding and primary benefit of simply getting rid of the material.

PARTIES TO THE PROCEEDING

Safe Air for Everyone, also known as the Idaho Clean Air Foundation, Inc., was the appellant in the Ninth Circuit below. Wayne Meyer, William Dole, Michael Dole, Warren Dole, Jacquot Farms Enterprises, Inc., G. Wade McClean, Terry Nichols, Satchwell Farms, Inc., Wallace Meyer, David Asher, Terrell K. Baune, Baune Farms, Inc., Jeff Bloomsberg, Bergen Bothman, Arnold Brincken, Doug Bruce, Earl M. Clausen, Clausen Farms, Inc., Keith Daman, Paul Daman, Denny Bros., Chad Denny, Matthew Drechsel, Drechsel Brothers, Inc., Dennis Duncan, David Duncan, Chris Duncan, Joyce Duncan, Randy Duncan, David Fish, Thomas Freeburg, Gary French, Charles A. Hahner, Hahner Farms, Inc., Larry Hansen, Martin Hanson, Hatter Creek Farms, Inc., Don Hay, Larry Heaton, Clarence Heeg, Randy Holt, Duane Jenneskens, Dale R. Johnson, Ted Lacy, Phillip Lampert, Lampert Farms and Ranch, Inc., David Lampert, Eric Larson, Brian Lashaw, Mike Lashaw, Nick Lawson, Casey Lawson, Allen Lewis, Maple Leaf Farms, Inc., Herbert W. Millhorn, Millhorn Farms, Inc., Bruce Mills, Catherine Morris, Richard Morrison, Elmer Ness, Erling Place, Chris R. Ramsey, Michael Roecks, Rogada Farms, Inc., John Schultz, Karl Schultz, Joe Sievers, Ron Tee, Donald Thies, Alan Thomas, Gene Towne, Winday Hill Farms, Inc., Todd E. Wright, Gary Wright, Wrights, Inc. were all appellees in the Ninth Circuit below.

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American Mining Congress v. EPA,
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The Coasters, Yakety Yak, on The Very Best of the Coasters (Rhino Records 1994) 15

48 Fed. Reg. 14472 (1983) 6, 22

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H.R. Rep. No. 98-198, 98th Cong., 2d Sess. (1984) 6, 24

Jan G. Laitos & Celia Campbell-Mohn, The Regulation of Toxic Substances and Hazardous Wastes (2000) 5

Donald G. McNeil, *Upstate Waste Site May Endanger Lives*, NYT A1:1 (Aug. 1, 1978) 12

Jeffrey G. Miller & Craig N. Johnston, The Law of Hazardous Waste Disposal and Remediation (1996) 3, 5

Oxford English Dictionary (2d ed. 1989) 15

Random House Webster's Unabridged Dictionary (2d ed. 1997) 15

Robert Reinhold, *U.S. Offers to Buy All Homes in Town Tainted by Dioxin*, NYT A1:6 (Feb. 23, 1983) 12

Richard B. Skaff, *Emergency Provisions in the Environmental Protection Statutes: A Suggestion for a Unified Emergency Provision*, 3 Harv. Envt'l L. Rev. 298 (1979) 24

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Petitioner Safe Air for Everyone respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 373 F.3d 1035 and reproduced in the appendix hereto at Pet. App. A1. The opinion of the district court is unreported and is reproduced at Pet. App. A32.

JURISDICTION

The judgment of the Ninth Circuit was entered on July 1, 2004. Pet. App. A1. The Ninth Circuit denied rehearing and rehearing en banc on October 5, 2004. Pet. App. A49. On December 22, 2004, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and included February 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1004(3), (5), (27), & (34) and 7002(a)(1)(B) of the Resource Conservation and Recovery Act, codified at 42 U.S.C. §§ 6903(3), (5), (27), & (34), 6972(a)(1)(B) are reproduced at Pet. App. A50.

STATEMENT

This case arises out of an action brought by petitioner, Safe Air for Everyone (SAFE), pursuant to Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a)(1)(B), alleging that respondents' burning of massive amounts of crop grass residue presents an "imminent and substantial endangerment," within the meaning of that statutory provision, and seeking injunctive relief. The district court dismissed the complaint on the ground that RCRA does not apply to respondents' activities because the burning of grass residue does not constitute a "disposal" of a "solid waste." A divided panel of the court of appeals affirmed, ruling that summary judgment in favor of respondents was proper. According to the appellate court, the grass residue is not a "discarded material," which is the RCRA statutory definition of "solid waste" (42 U.S.C. § 6903(27)), even if 99.9 percent of the reason for the burning is to get rid of the material so that the material does not harm crop productivity. Neither lower court disputed petitioner's evidence that respondents' burning of residue causes severe and widespread adverse human health effects, including the deaths of three residents and multiple hospitalizations of others.

Review of the Ninth Circuit's judgment is warranted. The court's reasoning is contrary to the plain meaning of the statutory language, ignores EPA's authoritative interpretation of that language, and threatens to create an extraordinarily broad "recycling" loophole that would allow easy circumvention of RCRA's important human health and environmental protections. The case also presents a wide and deep conflict in the federal circuit courts of appeals.

A. The Resource Conservation and Recovery Act.

The Resource Conservation and Recovery Act (RCRA) "is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." Meghrig v. KFC Western, 516 U.S. 479, 483 (1996); see City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 331 (1994). RCRA was part of the second wave of the nation's modern environmental law statutes. The first wave, consisting of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* and the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, sought to achieve environmental protection by focusing on pollutants emitted into specific environmental media (*i.e.*, air and water). Congress passed RCRA in 1976 largely because of its increasing concern that an exclusively media-based approach would ultimately just shift pollutants to the path of least regulatory resistance, in particular to contaminate land and groundwater See Jeffrey G. Miller & Craig N. Johnston, The Law of Hazardous Waste Disposal and Remediation 2-3 (1996). That is why Congress intended that the purpose of RCRA would be to eliminate the "last remaining loophole in environmental law" by focusing on risks caused by waste management regardless of environmental media. H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. Pt. 1, at 4 (1976).

To that end, Congress authorized EPA in RCRA to regulate the management of solid and hazardous wastes from "cradle to grave." Chemical Waste Management v. Hunt, 504 U.S. 334, 337 n.1 (1992). RCRA's central jurisdictional term is "solid waste." While the Act imposes its "much more stringent" regulatory requirements on those who treat, store and dispose of "hazardous waste" rather than on those who manage "solid waste" (see City of Chicago v. Environmental Defense Fund, 511 U.S. at 332, 339), "hazardous waste" is a subset of "solid waste." In other words, unless a material is "solid waste" in the first instance, it cannot be considered "hazardous waste" within the meaning of RCRA.[1] The material falls wholly

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[1] The term "hazardous waste" means a *solid waste*, or combination of *solid wastes*, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may –
(A) cause, or significantly contribute to an increase in mortality

outside of RCRA in all respects.

Congress, accordingly, broadly defined "solid waste" in RCRA to mean "any garbage, refuse, sludge * * * *and other discarded material* * * * *resulting from* industrial, commercial, mining, and *agricultural operations* * * *." 42 U.S.C. § 6903(27) (emphasis added).[2] The statutory touchstone for "solid waste," therefore, turns on whether the secondary material (*i.e.*, any material generated by "industrial, commercial, mining, and agricultural operations") is "discarded." Significantly, secondary material generated by agricultural activities is expressly included, not excluded, from the statutory definition.

RCRA, however, does have "twin goals," both of which are relevant in determining the meaning of "discarded material." City of Chicago v. Environmental Defense Fund, 511 U.S. at 339. As suggested by its name, RCRA seeks both to "encourag[e] resource recovery and protect[] against contamination." *Id.* Yet, these two goals "sometimes conflict." *Id.* Within the administration of RCRA, for instance, exempting all recycling of secondary materials from RCRA's regulatory requirements would certainly promote such resource recovery efforts. But the concomitant cost would be the failure to regulate the health and environmental risks created by those activities, many of which, especially burning and placement on land, present the same kind and degree of risk created by classic waste disposal and treatment activities such as

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or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5) (emphasis added).

[2] The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations * * *.

42 U.S.C. § 6903(27).

incineration and landfill. See Miller & Johnston, *supra*, at 3; Jan G. Laitos & Celia Campbell-Mohn, The Regulation of Toxic Substances and Hazardous Wastes 683 (2000).

Congress never delineates precisely in RCRA how the balance should be struck between these two goals. Congress, however, does make clear that material is not generally exempt from the meaning of "solid waste" simply because it is being recycled. In 1984, Congress added a provision requiring RCRA regulation of small volume generators of hazardous waste. See 42 U.S.C. § 6921(d). That specific provision commands EPA to establish hazardous waste management standards for small volume generators "sufficient to protect human health and the environment," including "standards applicable to the legitimate use, reuse, recycling, and reclamation of such wastes." *Id.*

EPA, charged by Congress with implementation of RCRA, has not promulgated regulations purporting to define the meaning of "solid waste" or "discarded material" as applied to recycling activities for the statute as a whole. The Agency has instead promulgated regulations that address the meaning of the statutory definition of solid waste as applied to recycling only for the purposes of administration of RCRA's hazardous waste program set forth in RCRA Subchapter C. 40 C.F.R. § 261.1(b)(1). EPA has consistently maintained that the statutory definition of "solid waste" applicable outside the context of Subchapter C is broader than the regulatory definition applicable only to hazardous wastes. See 50 Fed. Reg. 614, 627 (1985); 68 Fed. Reg. 61558, 61562 (2003).

In 1985, EPA first promulgated its detailed regulations addressing the meaning of solid waste as applied to recycling activities potentially subject to regulation under RCRA's Subchapter C hazardous waste management program. 50 Fed. Reg. 614 (1985); see 40 C.F.R. §§ 261.1 - 261.4. The Agency rejected the extreme positions of either exempting all recyclable materials from the meaning of solid wastes or including them all. 50 Fed. Reg. at 617. The Agency concluded that it would "ordinarily have jurisdiction to regulate most recycling activities" because "regulation of most of these activities is necessary to

protect human health and the environment." *Id.* EPA explained that it was "guided by the principle that the paramount and overriding statutory objective of RCRA is protection of human health and the environment. The statutory policy of encouraging recycling is secondary and must give way if it is in conflict with the principal objective." *Id.* at 618, *citing* 48 Fed. Reg. 14472, 14492 (1983) and H.R. Rep. No. 98-198, 98th Cong., 1st Sess., at 46 (1983).

EPA, accordingly, defined in its regulations two broad categories of recyclable secondary materials: "those that are classified as solid wastes when recycled, and are therefore subject to regulation under RCRA, and those that are not considered solid wastes when they are recycled, and thus are not regulated." 68 Fed. Reg. 61558, 61561 (2003). The dividing line for the Agency was between those recycling practices that the Agency considered "to be more akin to normal industrial production" and those recycling practices that bore "more resemblance to waste management" and therefore presented heightened health and environmental risks. *Id.*; see 50 Fed. Reg. at 616-618.

Although the resulting regulations draw a series of extremely technical and precise distinctions in their application to specific industries and industrial practices (see 40 C.F.R. §§ 261.1 to 261.4), the Agency broadly classified certain kinds of activities, including certain recycling activities, as warranting the conclusion that the secondary materials involved were being "discarded" and therefore constituted "solid wastes." Of particular relevance to this case, EPA concluded that material that is "abandoned" by being "burned or incinerated" is discarded material. 40 C.F.R. § 261.2(a)(2), (b)(2). In addition, secondary material that is "recycled" either by being "used in a manner constituting disposal," such as placement on land, or "used to produce a fuel," constitutes discarded material. *Id.* § 261.2(c)(1), (c)2)(i)(B).[3]

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[3] EPA's regulations included a few isolated exceptions for certain "commercial chemical products" specifically listed in its regulations, but those exceptions are not relevant to this case. See 40 C.F.R. § 261.2(c)(1)(ii), (c)(2)(ii); see *id.* § 261.33.

B. Proceedings Below

1. On May 31, 2002, petitioner, Safe Air for Everyone (SAFE), filed this action against respondents in the United States District Court for the District of Idaho pursuant to Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B). That statutory provision allows citizens to file suit against any person "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." *Id.* SAFE is a non-profit corporation, led by physicians concerned about the serious, adverse health effects of grass residue burning, formed for the sole purpose of taking action with respect to the health crisis that its members believe is being caused by grass residue burning. Respondents are 75 individuals and corporations that grow Kentucky bluegrass seed commercially in North Idaho and, after harvesting the seed, burn the grass residue that remains on the field. The burning takes place in two general areas: within the Rathdrum Prairie in Kootenai County, Idaho, and within the boundaries of the Coeur d'Alene Reservation. SAFE alleged in its complaint that the smoke and particulate pollution created by the massive open field burning has contributed to an imminent and substantial endangerment to public health in Idaho and Washington. Pet. App. A35; E.R. 1-29.[4]

SAFE moved for a preliminary injunction on its RCRA Section 7002 claim, supported by an extensive evidentiary submission of 121 fact and expert declarations and also by expert and witness testimony at a preliminary injunction hearing. This evidentiary submission and testimony addressed both the nature of respondents' disposal practices through burning and the resulting severe public health impact on surrounding communities. Pet. App. A2-A3; E.R. 58-194, 195, 198-205, 208-222, 226-235.[5]

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[4] "E.R." refers to Excerpts from the Record in Support of Plaintiffs-Appellants filed in the court of appeals.

[5] Because the court below upheld dismissal of the complaint on summary judgment, the evidence submitted must be viewed in the

Farmers typically plant Kentucky bluegrass in the spring, but the crop does not flower and produce seed until the following year. By the summer of that next year, the flowers have produced seed, and the grass plants are 15 to 36 inches tall. Growers, such as respondents, then cut the crop close to the ground, normally several inches high. The cut portion of the plant cures in the field for several weeks, which dries out the seed heads in preparation for combining. Pet. App. A2, A14.

After the bluegrass straw is cured, a combine separates the seed from the straw, then deposits the seed into a bin and places the straw back onto the field. The growers must remove this grass residue from the field at a later time. Otherwise, bluegrass, a perennial crop that can produce seed for several years from a single planting, will not effectively produce seed in the following years. If left on the field, the residue will keep sunlight and moisture from reaching the crown of the plant during the critical fall re-growth period. Pet. App. A29 n.9; see note 6, *infra*.

Respondents all get rid of the residue by open field burning, which is the most inexpensive method of residue removal. Ridding the field of the grass residue to allow for sunlight and moisture to reach the soil underneath is 99.9 percent of the reason for its removal.[6] The fire also eliminates some insects and pesticide residue and molds that would otherwise find food and shelter in the crop grass residue. The ash remaining after the fire can contain some small amounts of organic matter, including nitrogen, valuable to the farmer as a fertilizer for the soil. Pet. App. A13-A15; E.R. 223.

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light most favorable to the petitioner, as the non-moving party. See Board of Education v. Earls, 536 U.S. 822, 849 (2002).

[6] As the court of appeals noted (Pet. App. 14 n.11), one witness, Donald Jacklin, testified that "99.9 percent" of the reason for burning the residue was the "photo induction enhancement of seed yield." E.R. 223; Pet. App. A58-A59. Jacklin further explained that the photo induction enhancement occurs because burning "rids the surface" of the grass residue and the increased seed yield then occurs because the bare soil is exposed to the sunlight for a longer period of time. *Id.* Accordingly, it is exclusively the residue's removal that produces this benefit. The relevant testimony is set forth at Pet. App. A58-A59.

Respondents engage in open field burning of grass residue on a seasonal basis on over 7000 acres on the Rathdrum Prairie and on over 30,000 acres within the Coeur d'Alene Reservation. The burning produces massive clouds of smoke containing high concentrations of pollutants, including particulate matter, that cause severe adverse human health impacts. Pet. App. A2; E.R. 58-130. The State of Washington has, due to these adverse health effects, completely banned such burning and the State of Oregon has mostly banned the practice. Farmers in those States comply by removing the grass residue mechanically. See Pet. App. A13, A41 & n.4; E.R. 218.

Petitioner's complaint alleged, and its detailed evidentiary submission and hearing testimony established, that the smoke plumes from the burning reach residential communities[7] and that the resulting serious and widespread health effects include increased coughing, respiratory illness, difficulty breathing, decreased lung function, and lung disease. The evidence further demonstrated that health effects are greater for infants, children and the elderly, asthmatics, and those with chronic heart or lung disease. Underscoring the potential severity of these impacts, petitioner's submission established that three North Idaho citizens have died in recent years from episodes of acute respiratory distress precipitated by grass residue burning and that many other citizens have had adverse reactions to the burning so severe that they could have died without immediate medical attention.[8] SAFE also submitted one hundred

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[7] A photograph submitted into evidence shows clouds of smoke produced during open field burning in close physical proximity to a residential neighborhood. See Pet. App. A60 (June 3, 2002, Declaration of Arthur Long, Exhibit F).

[8] For instance, the Kootenai County Coroner submitted a declaration and testified at the trial court hearing that Marsha Mason, a resident of Rathdrum, Idaho, died as a direct result of grass residue burning. The official Coroner's death certificate expressed his opinion, "to a reasonable degree of medical certainty, that Marsha Mason's death was caused by status asthmaticus precipitated by exposure to severe air pollution from grass field burning." See E.R. 122. Another resident described how his wife collapsed and died, at age 37, after being exposed to smoke from grass residue burning. See E.R. 191. Similarly,

declarations from citizens whose lives and health have been adversely affected by grass residue burning. E.R. 58-194, 195, 198-205, 198-222, 232-235.

2. The district court granted respondents' motion to dismiss. Pet. App. A47.[9] The court did not question any of petitioner's evidence concerning the severity of the adverse health impacts caused by respondents' open field burning of massive amounts of grass residue. The court based its dismissal exclusively on its conclusion of law that the grass residue was not a "solid waste" and therefore the burning of the grass residue was not a "disposal" of "solid waste." *Id.* at A39.

3. With one judge dissenting, the court of appeals affirmed. Pet. App. A19.[10] The court held that SAFE had "failed to demonstrate that a genuine issue of material fact exists as to whether grass residue is 'solid waste' under RCRA." *Id.* at A2. Like the district court, the court of appeals did not question the validity of the evidence of the very severe and widespread adverse human health effects, including the death of three residents, caused by the open field burning of the grass residue. *Id.* at A19 n.15.

According to the court of appeals, summary judgment was compelled because, even viewing the evidence in the light most favorable to petitioner, "there is no dispute that [respondents] realize farming benefits from reusing grass residue in the process of open burning." Pet. App. A15. The court did not question the validity of petitioner's evidentiary submission "that the two most important

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a mother described the effect of the smoke on her 10-year-old daughter, who suffers from cystic fibrosis and who had to be hospitalized because of her exposure. See E.R. 180.

[9] The district court characterized its dismissal as a dismissal for lack of subject matter jurisdiction pursuant to Fed. R. Civ. Pr. 12(b)(1), reasoning that because crop residue did not amount to a "solid waste," RCRA Section 7002 did not provide jurisdiction over the complaint. Pet. App. A34.

[10] The court of appeals affirmed the district court's judgment, but not its conclusion that there was a lack of subject matter jurisdiction. See note 9, *supra*. The court of appeals held that there was subject matter jurisdiction, but then granted summary judgment on the merits for respondents. Pet. App. A6-A7, A19.

benefits from open burning of grass residue, sunlight absorption and enhancing productive life of bluegrass fields, result from the removal of grass residue," and that the other purported benefits – "the fertilizer in the ash and reduced pesticide use" – are merely "incidental benefits." *Id.* The court likewise assumed the validity of testimony that the farming benefits obtained by simply ridding the surface of the fields of the grass residue was "99.9 percent" of the reason why respondents engaged in such open field burning. *Id.* at A14 n.11. The court also accepted the testimony of petitioner's expert that the amount of organic matter "that remains after burning provides little benefit to the soil." *Id.* at A14 n.12. The court nonetheless reasoned that so long as there were any benefits from the open field burning, no matter how incidental to the overriding and "primary" purpose of simply getting rid of the grass residue, the residue could not be considered "discarded" under "RCRA statutory language." *Id.* at A14-A15. Finally, the court rejected petitioner's contention that the fact that respondents were burning the grass residue was relevant to whether the material was being discarded. *Id.* at A17 n.13. The court ruled that "[t]he determination of whether grass residue has been 'discarded' is made independently of *how* the materials are handled." *Id.* (emphasis in original).

Judge Paez dissented. Pet. App. A20. He reasoned that "[b]ecause there is no dispute that [respondents] burn the post-harvest crop residue to remove it from the fields, and because this act of removal is within the plain meaning of 'discard,'" the district court's judgment should have been reversed. *Id.* at A22. The dissent stressed that respondents "admitted that the residue had to be removed from the fields in order to maintain seed production and to limit the insects and parasites that would otherwise find food and shelter in the residue." *Id.* at A21.

REASONS FOR GRANTING THE WRIT

Congress sought by enacting the Resource Conservation and Recovery Act to eliminate the "last remaining loophole in environmental law." H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. Pt. 1, at 4 (1976). Perversely, however, by ignoring the plain meaning of the statutory language, the Ninth Circuit's construction of RCRA's central jurisdictional term – "solid waste" – would create a loophole that would defeat RCRA's ability to protect human health and the environment from injuries caused by the mismanagement of solid and hazardous wastes. Under the court of appeals' proffered construction, the term "solid waste" would not extend to any secondary material susceptible to some beneficial use, no matter how incidental in nature. Indeed, RCRA would not even apply where, as here, the primary "benefit" is avoiding the harm the material would otherwise cause and that "benefit" is therefore achieved by destroying the material. The lower court's reading simply cannot be squared with the plain meaning of "discard."

Because, moreover, "hazardous waste" is a subset of solid waste, the implications of such a judicial misconstruction of RCRA's language immediately extend to both RCRA's solid and hazardous waste programs. Generators of secondary materials from industrial, manufacturing, and agricultural practices could engage in classic waste disposal activities – in this case, the burning of massive amounts of such material in open fields – and avoid any RCRA regulation. They could, based on the Ninth Circuit's ruling, rely on the incidental fact that their secondary material, like virtually all secondary material, includes some constituents with residual economic value, whether as "fuel" as in this case, or as "dust suppressant" as in Times Beach, Missouri, or as construction "fill" as in Love Canal, New York. See Robert Reinhold, *U.S. Offers to Buy All Homes in Town Tainted by Dioxin*, NYT A1:6 (Feb. 23, 1983); Donald G. McNeil, *Upstate Waste Site May Endanger Lives*, NYT A1:1 (Aug. 1, 1978).

For more than twenty years, EPA has reconciled RCRA's competing objectives – promotion of recycling

and protection of public health and the environment – by rejecting a broad recycling exemption from the definition of "solid waste." The Agency has defined the term in a manner designed to protect public health and the environment from waste mismanagement while exempting only certain narrowly defined, low risk, recycling activities. EPA concluded that otherwise RCRA's objectives could not be accomplished. For that same reason, however, by rejecting EPA's threshold construction of the jurisdictional term "solid waste," the court of appeals' ruling completely unsettles the Agency's entire regulatory program.

The Ninth Circuit's ruling also creates a wide and deep circuit conflict. Five federal courts of appeals have rejected the Ninth Circuit's reading of RCRA in a variety of ways. In sharp contrast to the Ninth Circuit, each of those other circuits has endorsed the essential proposition that a generator of solid waste cannot evade the statute's requirements simply by exploiting the fact that the secondary material has some residual economic value for the generator's business. They have also taken sharp issue with the Ninth Circuit's view that the manner of recycling – in this case, destruction by burning – is irrelevant to the question whether the material is being discarded.

Review by this Court is warranted in this case to provide clarity on a pure question of law of critical importance to the implementation of one of the nation's most significant environmental protection statutes. RCRA's regulatory reach and ambition are too widespread to tolerate so much uncertainty regarding the meaning of its central jurisdictional term. As underscored by this case, the human costs of that uncertainty are also massive. Respondents' activities are causing serious adverse health effects, including hospitalizations and even deaths. The petition for a writ of certiorari should be granted.[11]

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[11] Because the Ninth Circuit's ruling has such profound implications for EPA's administration of RCRA, the Court may wish to invite the Solicitor General to file a brief expressing the views of the United States. See note 25, *infra*.

I. The Ninth Circuit misconstrued the meaning of RCRA's statutory definition of "solid waste"

The decision of the Ninth Circuit is inconsistent with the plain meaning of RCRA's statutory language defining "solid waste," RCRA's structure and purpose, and EPA's authoritative regulations construing that same statutory language for the purposes of RCRA's hazardous waste management program. The Ninth Circuit did not dispute that respondents' primary reason for open field burning of grass residue was the destruction of that secondary material because of the harm the residue would otherwise cause. Indeed, the court was willing to assume that getting rid of the grass was 99.9 percent of the reason for its burning. See pages 8 & note 6, 10, *supra*. According to the court, however, so long as some "farming benefits" were realized from that burning, the residue's destruction did not render that material "discarded." The court further elaborated that "[t]he determination of whether grass residue has been 'discarded' is made independently of *how* the material is handled." Pet. App. A18 n.13.

The Ninth Circuit's reasoning is triply flawed. First, when 99.9 percent of the reason that a person is burning material is to get rid of it, such material is being "discarded" within the plain meaning of that term. Second, farming benefits produced by the material's destruction do not defeat classifying the grass residue as "discarded material," and therefore as "solid waste," within the plain meaning of RCRA. Third, the determination of whether the grass residue has been discarded *cannot* be made "independently" of how the materials are handled because the manner of their handling is, as in this case, often the most pertinent evidence that the material is in fact being discarded.

1. First, the Ninth Circuit's ruling gives mere lipservice to this Court's frequent admonition that "'[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" Engine Manufacturers Ass'n v. South Coast Air Quality Management Dist., 541 U.S. 246 (2004), slip op. 5, *quoting* Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S.

189, 194 (1985). The ordinary meaning of "discard" in its statutory context is "to cast off, cast aside, reject, abandon, give up." Oxford English Dictionary, 728 (2d ed. 1989); see American Heritage Dictionary of the English Language, 514 (4th ed. 2000) ("to throw away; reject"); Random House Webster's Unabridged Dictionary, 561 (2nd ed. 1997) ("to cast aside or dispose of; get rid of"). It cannot be seriously contended that getting rid of secondary material produced by industrial, manufacturing, agricultural or commercial activities must be the exclusive (100%) reason for its destruction or abandonment before such material can be considered "discarded" and therefore solid waste. A person might well enjoy the incidental aerobic benefit of fresh air and exercise from taking the garbage out to the curb once a week. Or a parent might correctly believe that it is extremely important to have his or her child perform that errand to learn how to accept responsibility by doing household chores.[12] But it defies even the barest notions of commonsense and understanding to suppose that such an incidental benefit removes the garbage being taken out to the street from the solid waste category.[13]

The Ninth Circuit, however, did just that. It concluded that the grass residue was not "discarded," even if 99.9 percent of the reason for its burning was to get rid of it. See note 6, *supra*. According to the court (Pet. App. A14-16), so long as it could point to some other benefits, for instance, small amounts of nitrogen in the resulting ash, the grass residue was outside the plain meaning of "discarded material" no matter how incidental the value

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[12] See T. Berry Brazelton & Joshua D. Sparrow, Touchpoints 3 to 6, 339 (Perseus Pub. 2002); see also The Coasters, Yakety Yak, on The Very Best of the Coasters (Rhino Records 1994) ("*Take out the papers and the trash or you don't get no spending cash -- if you don't scrub that kitchen floor you ain't gonna rock'n'roll no more -- Yakety yak, don't talk back*").

[13] The State of Idaho's own statutory program further confirms the plain meaning of RCRA's statutory definition of solid waste as applied to respondents' practices. The Idaho legislature enacted in 1999 the Idaho Smoke Management and Crop Residue Disposal Act, Idaho Code §§ 22-4801 to 22-4804. That state law specifically refers to open field burning as "disposing of crop residue." *Id.* § 22-4803(a); see ID Admin. Code, Tit. 6, Ch. 16, § 500 (rules applicable to "[a]ll persons intending to dispose of crop residue through burning").

of nitrogen was to the respondents' overriding purpose of material destruction. The Ninth Circuit's claim notwithstanding, the plain meaning of "discarded material" cannot be fairly said to command that result.

2. The Ninth Circuit's second error lies in its reliance on the fact that the burning of crop grass residue produced "farming benefits." Pet. App. A15. The court's mistake was its complete failure to apprehend the legal significance of the fact that almost all of those benefits resulted from getting rid of the wastes.

We do not deny that there were farming benefits to be obtained from getting rid of the crop residue. Of course there were. But the mere existence of some economic advantage, even if substantial, to material destruction does not convert the material being destroyed into something other than solid waste and its destruction into something other than the disposal or treatment of solid waste.

The facts of this case are illustrative. As the court of appeals itself acknowledged, respondents' destruction of grass residue served several beneficial purposes because the presence of the residue would otherwise cause significant harm by impeding future crop productivity. For instance, getting rid of the grass residue was primarily necessary in order to expose the plant crown to sunlight, air, and water. Pet. App. A14-A15, A21-A22; see note 6, *supra*. Destruction of the grass residue also rid the soil of possible weed growth. *Id.* Finally, the burning destroyed some insects, pesticide residue and molds that would otherwise find food and shelter in the grass residue. *Id.*[14]

But rather than demonstrating that the grass residue was not being discarded, each of these alleged farming benefits conclusively establishes the correctness of the opposite conclusion. Although the lower court tries mightily to characterize these as "farming benefits" of the grass residue (Pet. App. A15), each is firmly rooted in respondents' desire to get rid of the residue by its incineration because of the harm the material would otherwise cause to future crop productivity. The purported benefits come from the advantages of the

[14] See Supplemental Excerpts from the Record in Support of Defendants-Appellees, 11, 15.

secondary material *being destroyed.* Whatever ambiguity might possibly exist in the meaning of "discard" in other contexts, no such ambiguity exists in terms of its application to material destruction. Such destruction constitutes classic abandonment or discard under longstanding and well settled understandings of the meaning of that word.[15]

Nor does the fact that the grass residue serves as the fuel of its own destruction take it outside the plain meaning of "solid waste." Pet. App. A15. Much waste can be burned. That the material's chemical composition allows it to burn does not render its incineration a "beneficial" reuse of material rather than a "discard." Yet, that is essentially what the Ninth Circuit held.

Finally, the court of appeals' reliance (Pet. App. A13-A16) on the fact that some incidental amounts of nitrogen contained in the ash residue can be returned to the soil as "fertilizer" is misplaced. At most, those nominal amounts of nitrogen would themselves not be considered "solid waste" because they are not being "discarded." But that possibility does not immunize the much larger amount of post-harvest grass residue from being a "solid waste." Such an outcome would be far more than even the proverbial tail wagging the dog. It would more closely approximate a single hair on the tail of the dog doing so.

Indeed, EPA's regulations make quite clear the Agency's view that secondary material generated by "[t]he growing and harvesting of agricultural crops" and then "returned to the soil as fertilizers" is a "solid waste." 40 C.F.R. § 261.4(b)(2)(1). In exercising Agency authority to exclude such materials from the narrower definition of

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[15] That the crop residue at issue in this case falls within the plain meaning of "discarded material" is further reinforced by RCRA's definitions of both waste "disposal" and "treatment." "Disposal" means the "placing of any solid waste * * * into or on any land * * * so that such solid waste * * * or any constituent thereof may enter the environment or be emitted into the air * * *." 42 U.S.C. § 6903(3). "Treatment" refers to "any method, technique or process * * * designed to change the physical * * * character or composition of any hazardous waste * * * so as to render such waste nonhazardous * * * or reduced in volume." *Id.* § 6903(34). Respondents' activities are the kind Congress contemplated in describing both "disposal" and "treatment."

hazardous wastes, EPA regulations expressly refer to these materials as "solid wastes" and determine that they should be excluded only from the category of "hazardous waste" based on their return to the soil. Hence, the regulations both make clear that the crop residue is solid waste even if returned to the soil as fertilizer and never intimate that residue that is burned and not returned to the soil is not a solid waste, as the Ninth Circuit held.[16]

Even if, moreover, the plain meaning of the statutory exclusion was not sufficient, standing alone, to defeat the lower court's reading, EPA regulations interpreting that statutory exclusion (which the court below completely ignored) compel rejection of that reading. EPA's detailed regulations address an ambiguity in the application of the statutory definition of "solid waste" to some kinds of recycling activities. The ultimate source of that ambiguity is located in RCRA's dual and sometimes conflicting purposes of promoting such recycling - to reduce the amount of solid waste - while simultaneously seeking to protect human health and the environment from the very real risks caused by management of secondary materials, including some management that can be fairly (and some unfairly) dubbed "recycling."

Yet, notwithstanding their complexity as applied to some kinds of recycling activities, EPA's regulations leave no doubt as to the regulatory status of the kind of activities relied upon by the Ninth Circuit in this case to escape RCRA's protective scope. Those regulatory efforts to distinguish between the status under RCRA of various kinds of recycling activities, ranging from closed loop industrial processes to offsite reclamations (see 40 C.F.R. §§ 261.1 - 261.4), create a regulatory labyrinth. But, as applied to this particular case, all roads in this labyrinth lead to the same clear conclusion: open burning of

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[16] EPA, therefore, has rejected the sweeping significance given by the Ninth Circuit to House Report language that "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation." Pet. App. A17, quoting H.R. Rep. 94-1491, 94th Cong., 2d Sess. 3 (1976). But the lower court's reading was in all events clearly misguided because the report language does not even purport to speak to the status of materials not returned to the soil but instead, as here, burned.

agricultural crop residue constitutes handling, treatment, or disposal of discarded material under the plain meaning of "solid waste" and EPA's authoritative construction.[17]

3. The Ninth Circuit's third error is no less fatal to its decision than the first two. Contrary to the court of appeals' ruling (Pet. App. A18 n.13), the determination of whether secondary material is being discarded can most certainly *not* be made "independently of how the materials are being handled." As forcefully explained by Judge Paez in his dissent below, "the fact that the residue is burned, rather than mulched and returned to the soil, *is* relevant to whether the residue constitutes 'solid waste' under RCRA." Pet. App. A24 n.6 (emphasis added).

Here again, the Ninth Circuit wholly ignored that EPA agrees with Judge Paez. Agency regulations define whether materials are being "discarded" based precisely on how the materials are being handled. See 50 Fed. Reg. 614, 618 (1985) ("solid waste" determination based on two inquiries: "both what the material is and how it is being recycled"). The regulations specifically provide that a "discarded material is any material which is * * * abandoned" and then further provide that "materials are solid waste if they are abandoned by being * * * burned or incinerated." 40 C.F.R. §§ 261.2(a)(2)(i), 261.2(b)(2). Respondents, of course, are doing just that: abandoning the crop residue by incineration. In addition, EPA's regulations likewise defeat the Ninth Circuit's assumption

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[17] Although EPA's regulations address only the question of the meaning of "solid waste" in RCRA's Subchapter C hazardous waste program (see 40 C.F.R. § 261.1(b)(1)), the regulations are relevant to this case because they represent EPA's authoritative construction of the same statutory language interpreted by the Ninth Circuit below and EPA has long construed the meaning of "solid waste" in the hazardous waste context as narrower, not broader, than in the statute as a whole, including Section 7002. 50 Fed. Reg. 614, 627 (1985); 68 Fed. Reg. 61558, 61562 (2003); see Connecticut Coastal Fisherman's Ass'n v. Remington Arms, 989 F.2d 1305, 1315 (2d Cir. 1993); Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct & Sewer Auth., 888 F.2d 180, 187 (1st Cir. 1989). Hence, if a secondary material constitutes "solid waste" for the purposes of Subchapter C, notwithstanding its nexus to recycling, that same secondary material would have to constitute "solid waste" for the purposes of Section 7002. The former is narrower, and never broader, than the latter. See pages 22-23, *infra*.

that the crop residue can avoid being classified as solid waste because respondents are "recycling" the residue by using it as "fuel" to blacken the soil or to eliminate insects within the residue. EPA's regulations expressly provide that recycling in this precise manner – using the secondary material as a fuel for burning – renders the material a "solid waste." See 40 C.F.R. § 261.2(c)(2)(i)(B).[18]

II. The Ninth Circuit's ruling seriously erodes RCRA's effectiveness in protecting human health and the environment

The legal issue presented by this petition concerns the meaning of the key jurisdictional term of one of the nation's most important environmental protection laws. The term "solid waste" determines RCRA's scope because RCRA seeks to regulate unreasonable risks to human health and the environment only to the extent that such risks are presented by "solid waste." RCRA offers protections, such as those established by Section 7002, against threats caused by mismanagement of solid wastes in general, but the Act focuses its most stringent requirements on those solid wastes that also meet the statute's criteria for being considered "hazardous" as well. See page 3, *supra*. RCRA's effectiveness in addressing human health and environmental risks created by mismanagement of secondary materials is therefore directly and immediately dependent upon the construction of the statutory term "solid waste." That is why courts and EPA refer to it as RCRA's "pivotal jurisdictional term," the meaning of which is "critical" because it plays a "key role in defining the scope of EPA's

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[18] Under EPA's classifications of different types of secondary material, respondents' grass residue would be a "by-product" (40 C.F.R. § 261.1(c)(3)), which, when used as a fuel, is a solid waste (*id.* § 261.2(c)(2)(i)(B)). The court of appeals also erred in positing (Pet. App. A15) that it was not factually disputed whether the burning benefitted the soil by blackening it. The expert witness upon whom the panel relied testified that he performed a comprehensive literature search and found no reference to soil blackening as a benefit of burning bluegrass. E.R. 253.

RCRA's authorities."[19]

For this same reason, the implications of the Ninth Circuit's narrow interpretation of "solid waste" is no less than staggering in terms of its impact on RCRA. The Ninth Circuit's reading would completely eviscerate the statute's ability to protect human health and the environment by effectively eliminating the statute's application to secondary materials susceptible to some, even fairly nominal, recycling. The court below has, in practical effect, created a gigantic loophole from regulation in a law that, ironically, Congress intended to close the last remaining loophole in environmental law. Not only would citizens lose the ability, as in this case, to use Section 7002 to challenge waste management activities that present imminent and substantial endangerments to their health, but RCRA's entire hazardous waste program would be seriously jeopardized.

1. For more than two decades, a central pillar of EPA's hazardous waste program under RCRA has been the Agency's 1985 rulemaking that the statutory language "solid waste" could be reasonably construed to include many materials subject to recycling and therefore RCRA's strict management requirements could apply to related recycling activities. See 50 Fed. Reg. 614 (1985); pages 5-6, *supra*. If, as the Ninth Circuit ruled in this case, the plain meaning of the statutory definition of "solid waste" does not extend to materials subject to the kind of recycling accomplished here, including burning for destruction, burning as "fuel," and burning to recover incidental chemical constituents in residual ash, then EPA would have no authority to construe that same statutory language anywhere in RCRA, including its hazardous waste program. The wide ranging kinds of recycled materials and recycling activities that EPA has for two decades concluded must be regulated as "hazardous waste" to accomplish RCRA's important objectives would

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[19] American Mining Congress v. EPA, 824 F.2d 1177, 1187 (D.C. Cir. 1987); Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1308 (2d Cir. 1993); 68 Fed. Reg. at 61561.

instead necessarily fall outside the statute's reach.[20]

2. Nor can this direct and far-reaching consequence of the court's ruling be avoided on the ground that EPA has made clear that its RCRA regulations construing "solid waste" apply only to its hazardous waste program. See 40 C.F.R. § 261.1(b)(1); page 5, *supra*. To be sure, if EPA were contending that the term "solid waste" somehow had a *broader* meaning in the context of the hazardous waste program than under the statute in general, such an argument could be fairly made. But, it most certainly cannot be fairly made where, as here, the reason for EPA's disclaimer in its hazardous waste regulations is its opposite determination that the term "solid waste" should have a *narrower* meaning in the hazardous waste context than in the statute as a whole.[21] A plain meaning

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[20] EPA concluded that the definition of "solid waste" should include most recycling activities because otherwise the Agency could not effectuate congressional intent to protect the public from the health and environmental threats presented by such activities. See 48 Fed. Reg. 14472, 14473, 14502-505 (1983); 50 Fed. Reg. 614, 616-618 (1985). To be sure, EPA did narrowly define some recycling activities, such as closed loop industrial processes, as not warranting such regulation, but the Agency's general policy was one of regulatory inclusion in seeking to define the kinds of recycling activities that were sufficiently akin to disposal (such as burning as fuel and placement on land) as to warrant heightened control. See page 5, *supra*. In justification of its decision, EPA included in its rulemaking a lengthy list of 67 hazardous waste sites around the nation, many of which were then on the Superfund National Priority List, that had been created by "recycling activities." 50 Fed. Reg. 614, 658 App. A (1985). Not surprisingly, many of these sites contained wastes that had avoided early RCRA regulation because industry had claimed that the materials involved were not waste but instead "fuel" capable of being burned. *Id.* Indeed, it was the desire to avoid more such Superfund sites that was largely why EPA decided in 1985 that RCRA's definition of "solid waste" should extend to many recyclable materials, especially those involving burning as fuel and placement on land. *Id.*

[21] EPA chose to construe more narrowly the term "solid waste" as applied to its hazardous waste program in order to avoid unduly chilling certain kinds of recycling activities that the Agency determined did not present the degree of health and environmental risks that warranted the full application of RCRA's very stringent requirements applicable to hazardous waste management. Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct and Sewer Authority, 888 F.2d 180, 187 (1st Cir. 1989).

construction of "solid waste," like that adopted by the Ninth Circuit below, that exempted virtually all recycled materials and recycling activities, would necessarily bar EPA from regulating such materials and activities under its Subchapter C hazardous waste program. If they fall outside the statutory definition of solid waste, they would necessarily fall outside the regulatory definition.

3. Like the statutory language, the statutory structure supports EPA's decision. In 1984, Congress amended RCRA to provide for regulation of small quantity generator waste, which had previously been exempted. See 42 U.S.C. § 6921(d). The new law required the EPA Administrator to promulgate generator, transporter, and treatment, storage and disposal requirements applicable to such waste. *Id.* § 6921(d)(1). But, for the purposes of this case, what is relevant is that Congress further provided that such standards should likewise be "applicable to the legitimate use, reuse, recycling, and reclamation of such wastes * * *." *Id.* § 6921(d)(2). Congress, therefore, clearly contemplated that the category of "solid wastes" would extend to material being recycled. Congress understood the health and environmental risks caused by these activities and their close kinship to classic disposal activities (see note 20, *supra*) and, accordingly, instructed EPA to ensure that "such standards shall be sufficient to protect human health and the environment." *Id.*

4. Finally, there is no merit to the Ninth Circuit's apparent belief (Pet. App. A19-A20 n.16) that the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, justifies the court's crabbed reading of RCRA. RCRA nowhere suggests that waste management activities potentially subject to Clean Air Act air emissions controls are exempt from RCRA regulation as "solid wastes." Indeed, when Congress wanted to create just that type of exclusion, it did so narrowly and expressly, as it did by excluding from the statutory definition of solid waste "solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under [Section 402 of the Clean Water Act]." 42 U.S.C § 6903(27). Absent such an explicit exclusion, there is no room within RCRA's plain

statutory terms to read into the Act a far more expansive Clean Air Act exception, especially when RCRA's driving purpose was to eliminate statutory loopholes and gaps.

Indeed, RCRA 7002(a)(1)(B), the citizen suit provision upon which petitioner relies in this case, is specifically aimed at filling the very kind of statutory gap presented here. Congress did not condition the right of a citizen to bring a suit under Section 7002(a)(1)(B) on the threshold showing of any violation of any specific requirement of a federal environmental law, whether based in RCRA, the Clean Air Act or any other law. Congress instead deliberately created a catch-all provision designed to provide judicial redress whenever an "imminent and substantial endangerment to health" is presented by the "handling, storage, treatment, transportation of any solid or hazardous waste." 42 U.S.C. § 6972(a)(1)(B). Congress created this public health safety net without regard to the precise environmental media (*i.e.*, air, water, land) by which the threat was conveyed in order to guard against the possibility that statutory gaps and loopholes might otherwise leave the public unprotected from serious human health hazards from environmental contamination. See Richard B. Skaff, *Emergency Provisions in the Environmental Protection Statutes: A Suggestion for a Unified Emergency Provision*, 3 Harv. Envt'l L. Rev. 298, 300-303 (1979); H.R. Rep. No. 98-198, 98th Cong. 2d Sess. Pt 1, 47-49 (1984). It is, accordingly, no answer to the plain meaning of RCRA, including Section 7002(a)(1)(B), to contend that SAFE should look elsewhere for judicial redress.[22]

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[22] Nor is the possibility of an action under state nuisance law a reason to deny relief in this case. RCRA does not supplant state nuisance law (42 U.S.C. § 6972(f)), but neither does state nuisance law supplant RCRA Section 7002(a)(1)(B). There is particular reason, moreover, not to do so in this case because of the tendency of many States, including Idaho, to create statutory provisions that immunize agricultural practices from common law nuisance lawsuits. Indeed, at the behest of some respondents in this case, Idaho recently enacted a state law effectively immunizing them from any possible state tort nuisance or trespass action based on harm caused by open field burning, no matter how severe the human health consequences. See I.C. § 22-4803A(6). Not only do such legislative enactments raise substantial constitutional concerns, in light of their negative impact on both private property values and human health (see Moon v. North

Congress concluded differently.

III The Ninth Circuit's ruling conflicts with the rulings of other federal courts of appeals that have construed the same statutory language

The Ninth Circuit's extraordinary ruling that a secondary material falls outside the statutory definition of "solid waste," even if 99.9 percent of the reason for its destruction is to get rid of it, because the material's destruction is "beneficial," finds no support in any decision of any other federal court of appeals. The divided panel's ruling, moreover, is indicative of growing confusion in the courts of appeals concerning the meaning of "solid waste" as applied to recycling under RCRA. That this confusion could have produced an appellate ruling in such defiance of RCRA's plain meaning and overriding purpose strongly counsels in favor of this Court's review.

1. Five other circuits have rejected the Ninth Circuit's central view that "solid waste," within the meaning of RCRA, cannot extend to secondary materials when being recycled so long as such recycling provides some economic "benefits" to the recycler. They also all further refute the extreme notion that material can be destroyed without being "discarded" if it is beneficial to destroy material that would otherwise be harmful. In sharp contrast to the court below, they all share the essential premise of the D.C. Circuit in *American Petroleum Institute v. EPA*, 216 F.3d 50, 57-58 (2000) that the "predominant purpose" in handling material determines whether it is "discarded" and therefore a RCRA "solid waste."

In *United States v. ILCO, Inc.*, 996 F.2d 1126 (1993), for instance, the Eleventh Circuit held that lead parts reclaimed from spent car and truck batteries for recycling purposes constituted "solid waste," notwithstanding their potentially significant economic value. The court rejected claims, analogous to those made by respondents and

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Idaho Farmers Ass'n, 96 P.3d 637 (Idaho 2004), petition for writ of certiorari pending No. 04-594), but they also underscore the wisdom of Congress's decision in Section 7002 to provide the public with protection in the face of hazards rising to the very high level of an "imminent and substantial endangerment."

upheld by the courts below, that the fact that the lead parts had potentially significant value necessarily took the secondary material involved outside RCRA's scope. The court instead ruled that "EPA has the authority to define materials destined for recycling as a subset of 'solid waste.'" *Id.* at 1131 n.8.

To similar effect was the D.C. Circuit's decision in *American Petroleum Institute v. EPA*, 906 F.2d 729 (1990). At issue in that case was the regulatory status of slag residue from the production of steel. It was undisputed that the slag residue was a valuable economic commodity based on its susceptibility to reclamation and the recovery of valuable metals. Yet, the D.C. Circuit ruled that the slag residue plainly fell within the statutory definition of "solid waste," actually rejecting a more narrow interpretation offered by EPA at the time. *Id.* at 740-742.[23]

In *Owen Electric Steel Co. of South Carolina v. Browner*, 37 F.3d 146 (4th Cir. 1994), the secondary material in dispute was once again slag material from steel production. On this occasion, the beneficial reuse was that the slag was being sold for use in roadbed construction. The Fourth Circuit, however, had no difficulty in concluding that EPA's regulations, which treated the slag as "hazardous waste," did not extend beyond the bounds of the same statutory definition of "solid waste" quite differently construed by the Ninth Circuit in this case. *Id.* at 149.

The Fifth Circuit decision in *United States v. Marine Shale Processors*, 81 F.3d 1361 (1996) is particularly relevant because it underscores the pitfalls of the Ninth Circuit's heavy reliance on the fact that the grass residue was capable of being burned as fuel. In *Marine Shale Processors*, the defendant claimed that contaminated soil was not a "waste" because the defendant was using it as a "product" in the form of a feedstock that was being burned. Presumably, the defendant in that case could have argued, like the court below held in this case, that one of the

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[23] In *American Mining Congress v. EPA*, 907 F.2d 1179, 1185 (D.C. Cir. 1990), the D.C. Circuit rejected the mining industry argument that secondary material generated by mining was not a "solid waste" because that material was "'beneficially reused in mineral processing operations.'" *Id., quoting* Final Brief of Consolidated Petitioners at 12.

benefits produced from the burning was getting rid of the contaminated soil. Not surprisingly, the Fifth Circuit had little difficulty rejecting the defendant's argument, ruling that the district court had erred in granting summary judgment to the defendant without first allowing the jury to consider factual allegations that the defendant's burning activity amounted to sham recycling. *Id.* at 1366.

Also in fundamental tension with the Ninth Circuit's sweeping rationale in its decision below is the Tenth Circuit's decision in *United States v. Self*, 2 F.3d 1071 (1993). In *Self*, the Tenth Circuit ultimately concluded that a particular reuse of a natural gas condensate did not amount to a "solid waste" under EPA's regulations more narrowly defining that term for the purpose of its hazardous waste program. The court of appeals, however, never questioned the validity of EPA's central position that "certain types of materials that are being recycled by being burned for energy recovery are considered solid wastes." *Id.* at 1077. The court agreed with EPA that the statutory definition of solid waste generally allows the Agency to regulate materials being recycled. *Id.* at 1077-79. The court also did not dispute that the burning of secondary materials generally amounts to a "discard." *Id.* The court parted ways with EPA only with regard to the Agency's interpretation of its own regulations as applied to a specific use of natural gas condensate. *Id.* at 1080-82.

2. This case would also be the right time for the Court to decide the legal issue presented. The Ninth Circuit's ruling is simply the most recent and extreme product of growing confusion in the lower courts concerning the status of recycled materials as "solid waste" under RCRA in general and Subchapter C in particular. Ever since 1987, when the D.C. Circuit handed down its ruling in *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987), both EPA and the lower courts have struggled to develop a coherent principle for distinguishing between recycled materials that fairly fall within the statutory definition of "solid waste" and those that do not. The D.C. Circuit's suggestion of a guiding principle purportedly based on a reading of the statute's plain meaning – which is little more than whether the waste materials are "part of the

waste disposal problem" (824 F.2d at 1186) - has proven largely circular and ultimately unhelpful. The resulting confusion has prompted EPA to make a series of missteps on either side of the D.C. Circuit's fairly illusory and panel-shifting dividing line.[24] It has also prompted the kind of extraordinarily misguided interpretation embraced by the Ninth Circuit in this case.

3. Finally, the existing circuit conflict is not one that should be tolerated. The conflict concerns the meaning of "solid waste," which is the central term defining the jurisdiction of RCRA, a national environmental program administered by EPA that is designed to protect human health and the environment. That jurisdiction should not be differently defined in different parts of the nation. As contemplated by Congress, the statute's scope as applied to both solid and hazardous wastes should be the same throughout the nation.

IV Review by this Court of the legal issue presented by this case is warranted now

Review is warranted because this case provides a good vehicle for resolution of an extremely important legal issue that divides the lower courts. There is no reason to await further litigation.

This case is an especially good vehicle because it presents the important legal issue as a pure question of law unencumbered by any procedural matters. The exclusive basis for the lower court's judgment was its interpretation of the threshold jurisdictional term "solid waste," as defined in RCRA Section 1004(27). The court did not dispute the validity of petitioner's claim that the

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[24] Compare American Mining Congress v. EPA, 907 F.2d at 1186 (the D.C. Circuit 1987 holding in *American Mining Congress v. EPA*, 824 F.2d at 1185 "concerned only materials that are 'destined for *immediate reuse* in another phase of the industry's ongoing production process'") with Association of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047, 1052-1054 (D.C. Cir. 2000) (rejecting EPA's claim that the 1987 D.C. Circuit decision in *American Mining Congress* turned on the material being subject to "immediate reuse" in a temporal sense) and Safe Food & Fertilizer v. EPA, 350 F.3d 1263, 1268 (D.C. Cir. 2003) ("But we have never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.'").

open burning of the crop grass residue created an imminent and substantial endangerment to human health and the environment, including the deaths of several residents in the immediate vicinity of the burning activity.

The procedural posture of the case also presents the legal issue regarding the meaning of "solid waste" in an especially advantageous posture for this Court's review. The Ninth Circuit granted summary judgment in favor of respondents, which means the court was bound to consider any conflicting factual allegations of the parties in the light most favorable to the petitioner, as the non-moving party. See Board of Education v. Earls, 536 U.S. 822, 849 (2002). The court did not, for this reason, dispute that the almost exclusive purpose of the burning was to get rid of the crop residue because of the harm otherwise created by the presence of the residue on respondents' fields. See Pet. App. 14a & n.11; note 6, *supra*. Nor did the court question petitioner's evidentiary submission that any small amounts of nutrients remaining in the ash residue after the burning could be of little use to the soil. Pet. App. A15 n.12. This case, therefore, raises the fundamental question of the regulatory status of recycling activities under RCRA in an especially clear and stark fashion.

Both the regulated industry and the public, such as members of SAFE, whom Congress intended to be the ultimate beneficiaries of RCRA's protection, need this Court's attention to this question of law. The legal issue concerning the relationship of recycling to the plain meaning of "solid waste" under RCRA has now percolated in the lower courts for 18 years and the upshot has been more, rather than less, regulatory incoherence, and finally this untenable court of appeals ruling. SAFE's interests at stake in this case are also immediate and compelling. Respondents' burning of massive amounts of grass residue is causing serious and widespread adverse health effects, which are especially severe for children and the elderly. There have been repeated hospitalizations, emergency medical care, and even several deaths. This Court's review of this important legal issue is now warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.[25]

Respectfully submitted.

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[25] Because of the implications of the lower court's decision for EPA's administration of RCRA, the Court might also invite the Solicitor General to file a brief expressing the views of the United States on the question presented either after granting the petition (see International Paper Co. v. Ouellette, 475 U.S. 1081 (1986)) or instead to assist the Court's decision whether to grant the petition in the first instance (see City of Chicago v. Environmental Defense Fund, 504 U.S. 906 (1992)).